LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 6 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 221

THE IOWA TRIBE OF THE IOWA RESERVATION IN OKLAHOMA, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY OF PETITIONERS TO MEMORANDUM FOR THE UNITED STATES

NICHOLAS CONOVER ENGLISH,
550 Broad Street,
Newark, New Jersey, 07102,
Attorney for Petitioners.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

The Memorandum for the United States in opposition to petitioners' Petition for a Writ of Certiorari, contains certain statements of law which cannot be allowed to pass unchallenged.

The United States says at page 2 of its Memorandum:

> "The very authorities relied on by petitioners (Pet. 7-9) make clear that this is not a situation for the application of a constructive-trust measure of recovery. Such recovery is allowed where the defendant, taking advantage of a special relationship (for example, that of a guardian to his ward), has obtained property by fraud or other misconduct. E.g., 4 Pomeroy, *Equity Jurisprudence* (4th ed.), §1053. Contrary to petitioners, the relationship of the United States and the Indian tribes cannot be likened to that of guardian and ward under private law."

We agree that the imposition of a constructive trust is allowed where the defendant, taking advantage of a special relationship, has obtained property by fraud or other misconduct. However, the Government's suggestion that the "special relationship" must be like that of a guardian to his ward is contrary to law. A constructive trust will arise in the absence of an intentionally created fiduciary relationship (Pet. p. 7), and the Government does not directly dispute that proposition.

The Government's statement "Contrary to petitioners, the relationship of the United States and the Indian tribes cannot be likened to that of guardian and ward under private law." is not only somewhat incorrect, but it misses the issue involved in the case at bar. The issue is not (as the Government would suggest) whether the relationship of the United States and the Indian tribes is likened to that of guardian and ward under private law; rather, the issue is whether the relationship between the United States and the Indian tribes, however it may be denominated, is of the

nature that calls for the imposition of a constructive trust, assuming that the Government obtained the Indians' property by fraud or other misconduct. This relationship is not a matter of labels. The Government focuses upon what it says the relationship is not. It is more relevant to focus upon what this Court has stated the substance of the relationship to be.

In *Cherokee Nation* v. *Georgia,* 5 Peters 1 (1831), Chief Justice Marshall stated at p. 17:

> "Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. The occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> "They look to our government for protection; rely upon its kindness and its power, appeal to it for relief to their wants; and address the president as their great father."

In *United States* v. *Kagama,* 118 U. S. 375 (1886), Miller, J. said for an unanimous Court at pp. 382 and 383:

> "Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall in the case of the *Cherokee Nation* v. *Georgia,* 5 Pet. 1, and in the case of *Worcester* v. *State of Georgia,* 6 Pet. 515, 536."

* * *

> "In the opinions in these cases they are spoken of as 'wards of the nation,' 'pupils,' as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time.
>
> • • •
>
> "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States."

At the very least, these cases establish that Indian tribes stand in a relationship of dependence upon the United States, and a relationship of this sort is sufficient basis for the imposition of a constructive trust (Pet. p. 7). In any event, this Court has more recently approached the problem, not from the definition of the relationship between the parties, but rather from the view point of what standards of conduct should control representatives of the Government who deal with the Indians, and, says this Court, such conduct should "be judged by the most exacting fiduciary standards" *Seminole Nation* v. *United States,* 316 U. S. 286, 297 (1942).

Moreover, the Government implies, without directly saying so, that the relationship between the United States and an Indian tribe is something different from the relationship between a dominant party and a dependent party under private law. This implication is directly contrary to the statement of this Court in *Choctaw Nation* v. *United States,* 119 U. S. 1 (1886), wherein the Court, speaking of the relationship between an Indian tribe and the Government, stated at p. 28:

> "The parties are not on an equal footing, and that inequality is to be made good by *the superior justice which looks only to the substance of the right,* without regard to technical rules framed under a system of municipal jurisprudence, *formulating the rights and obligations of private persons, equally subject to the same laws.*" (Emphasis supplied.)

Furthermore, when the United States is properly a party to a civil litigation, it stands on the same footing as a private individual and is equally subject to the principles of equitable jurisprudence. *U. S.* v. *Stinson,* 197 U. S. 200, 205 (1905); *State of Iowa* v. *Carr,* 191 Fed. 257, 266 (8 Cir. 1911); *Smale & Robinson, Inc.* v. *U. S.,* 123 Fed. Supp. 457, 466 (S. D. Cal. 1954).

The Government further states in its Memorandum (p. 3):

> "At all events, petitioners' claims must fail because there is no evidence, or indeed contention, that the United States obtained the lands in question from the Indians by improper means. Only the adequacy of the consideration is questioned; there is no suggestion that the cession was induced by trickery or other misconduct."

This quotation does not correctly state the law, which is to the effect that a grossly inadequate consideration is tantamount to fraud and will therefore furnish a basis for equitable relief. It was so held by the English Court of Chancery in *Chesterfield* v. *Janssen,* 2 Ves. Sen. 125 (Lord Hardwicke, L.C. 1750). That case having been decided by the English Court of Chancery prior to the independence of the United States, the doctrine thus laid down became a part of the equity jurisdiction of the Federal Courts, *Atlas Insurance Company* v. *Southern, Inc.,* 306 U. S. 563, 568 (1939); *Guaranty Trust Company* v. *York,* 326 U. S. 99, 105 (1945). The doctrine of *Earl of Chesterfield* v. *Janssen* was explicitly cited and adopted by this Court, speaking unanimously through Chief Justice Fuller, in *Hume* v. *United States,* 132 U. S. 406, 411, 414 (1889). The effect of the Indian Claims Commission Act, 25 U. S. C. 70a is to confer upon the Commission the same equity jurisdiction as is exercised by the Federal Courts. Necessarily and inescapably, this must include the power to give equitable relief in a case of fraud consisting of inadequate consideration.

The Government is in error in contending that *Sioux Tribe of Indians* v. *United States,* 146 F. Supp. 229 (Ct. Cl. 1956) supports any alleged rule of law that the Indians cannot recover profits made by the Government as the result of an unconscionable transaction, but must be limited to the fair value of the lands. The differences and distinctions between the *Sioux* case and the case at bar are clear and fundamental. In *Sioux,* the Indians sought to impose upon the Government an active duty of managing their property; this is characteristic of an express trust as distinguished from a constructive trust. 4 Scott on Trusts, §462.1, p. 3104. In *Sioux,* the taking was lawful since just compensation had concededly been paid, whereas in the case at bar, just compensation was not paid, but the compensation was so unjustly inadequate as to shock the conscience of the Commission and to call for relief in equity. In the *Sioux* case, since the taking was lawful, the duties which the Indians sought to impose upon the Government had to arise from some basis other than the transaction itself, and no such basis was found to exist. By contrast, in the case at bar, the duties which the Indians seek to impose upon the Government—namely, those of a constructive trustee—do arise out of the taking itself since that transaction was not lawful but was indisputably unconscionable and fraudulent. The duties of a constructive trustee do not arise out of an agreement, but arise, contrary to the parties' intention, out of the nature of the transaction itself in the light of the relative situation of the parties.

In its Memorandum in Opposition, the United States has not challenged the propositions that the Commission possesses the full equitable jurisdiction of the Federal Courts; that Congress intended to extend a broad measure of relief to Indian claimants under the Act; that the imposition and enforcement of a constructive trust is a well recognized head of equity jurisdiction; that the consideration paid to each of the petitioner tribes for the cession of the

lands in question was unconscionable; and that the Government's actions in acquiring Indian lands for an unconscionable consideration, fall far short of the "utmost good faith" required by Congress or "the most exacting fiduciary standards" required by this Court. The grounds put forward by the Government in opposition are, as we have endeavored to show, without merit.

The writ of certiorari should be granted.

NICHOLAS CONOVER ENGLISH,
Attorney for Petitioners.

McCARTER & ENGLISH,
Newark, New Jersey,

DYKEMA, WHEAT, SPENCER,
GOODNOW & TRIGG,
Detroit, Michigan,

SCHIFF, HARDIN, WAITE,
DORSCHEL & BRITTON,
Chicago, Illinois,

STANFORD CLINTON,
Chicago, Illinois,

MILLS & GARRETT,
Chicago, Illinois,
Of Counsel.